

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES A. STUART)	
Claimant)	
)	
VS.)	
)	
SPX COOLING TECHNOLOGIES, INC.)	
Respondent)	Docket No. 1,046,409
)	
AND)	
)	
ACE AMERICAN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the June 28, 2011 Award by Administrative Law Judge Marcia L. Yates Roberts. The Board heard oral argument on October 11, 2011. The Division of Workers Compensation's Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of former Board Member Julie A.N. Sample.

APPEARANCES

Timothy M. Alvarez of Kansas City, Kansas, appeared for the claimant. Mark Beam-Ward of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered work-related repetitive injuries to his bilateral upper extremities. But it was disputed whether he also injured his cervical spine as a result of his work-related repetitive activities. The Administrative Law Judge (ALJ) found claimant

suffered a 28 percent whole body functional impairment followed by a 90.5 percent work disability based upon an 81 percent task loss and a 100 percent wage loss.

The sole issue raised on review by respondent is whether claimant suffered a work related injury to his neck. Respondent argues claimant only suffered work-related injuries to his bilateral upper extremities and is only entitled to compensation for scheduled disabilities to his upper extremities.

Conversely, claimant argues the medical evidence provided by the court ordered independent medical examiner and claimant's medical expert establishes he suffered permanent injury to his cervical spine. Claimant requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Respondent fabricates and produces cooling towers. Claimant was hired as a shake operator for respondent in the spring 2007. He worked as a shake operator about a year and then changed to a break operator. Claimant explained the shake operator job:

Q. Tell me a little bit about the job that you did as a shake operator, what did that entail?

A. You took a hammer and chisel and took the piece of metal out of a formed sheet of metal. It had what they called micro-tabs all around it and you had to take a hammer and a chisel and beat them out and then transfer -- grab the part and transfer it over, you know, and stack it up.

Q. Okay. And were these pieces that you would break off these metal tabs or chisel off these metal tabs, were they varying in sizes?

A. Yes.¹

Claimant testified that the majority of his time was spent using a hammer and chisel. The remaining time was spent lifting and moving parts weighing 50-200 pounds over to a table.

¹ Stuart Depo. at 8-9.

In the brake operator job claimant had to drag a sheet of metal onto a table and then put bends into that piece of metal by lifting it. He testified:

Q. Okay. When you say you have to lift it to achieve the bend, explain to the Court what you mean by that.

A. Well, each piece would have various degrees of bends and you'd have to lift to support this piece of material by lifting it. Because if not, it would go ahead and get a back bend in it.

Q. Now, when you were just testifying, you were lifting your hand above shoulder level; is that correct?

A. Yes.

Q. Would at least some of the bends require you to lift that piece of steel that high?

A. Oh, yes.²

In May 2008 claimant began to have numbness and tingling in his hands. These symptoms progressed up his arm, into his shoulder and then into his upper back and neck. Claimant reported his symptoms and was referred for treatment at the Olathe Occupational Medicine Clinic. A June 25, 2008, record indicates claimant initially complained of right hand, arm and shoulder pain.³ As claimant received treatment it was noted his pain was progressing up his shoulder and across his back. But the primary concern was the problems with claimant's right wrist and elbow and claimant was referred to a hand surgeon for further treatment.

Dr. Federico Gonzalez, board certified in plastic and hand surgery, performed a full examination and also sensory testing on July 28, 2008. The doctor ordered electromyographic (EMG) studies to be performed by Dr. Carabetta, a physiatrist. Based upon Dr. Gonzalez' physical examination, he diagnosed claimant as having right cubital tunnel syndrome, bilateral carpal tunnel syndrome and left ulnar nerve compression at the wrist due to his repetitive motion activities at work. In August 2008, Dr. Gonzalez performed two surgeries which involved claimant's bilateral cubital tunnel releases in both elbows and also open carpal tunnel releases and ulnar nerve releases in both wrists. Claimant had recurrent symptoms on the left so another surgery was performed. A series of different therapeutic modalities was ordered in hopes of gaining better function, strength and use of his hands. The doctor opined that claimant's nerve compression conditions are work related due to his repetitive motion activities at work.

² R.H. Trans. (Jan. 12, 2011) at 9.

³ Pratt Depo., Ex. 2.

Claimant developed post-operative problems with a pseudo bursitis involving his left elbow despite attempts at drainage. Dr. Gonzalez performed an excision and then closed the bursa cavity. On August 31, 2009, Dr. Gonzalez opined that claimant was at maximum medical improvement and released claimant to full duty without restrictions. Dr. Gonzalez rated claimant with a 7 percent impairment to the right upper extremity and a 9 percent impairment to the left upper extremity.

Claimant testified that he complained of his neck pain at visits with both Dr. Gonzalez and the doctor's staff. But Dr. Gonzalez testified that he did not recall claimant making neck complaints and that it was his usual practice to document all complaints.

Dr. P. Brent Koprivica, board certified independent medical examiner and also board certified in emergency medicine, examined and evaluated claimant on November 6, 2009, at claimant's attorney's request. The doctor reviewed claimant's medical records and took a work and medical history from claimant. Claimant complained of numbness with no feeling in middle, ring and little fingers in both hands as well as pain radiating up both arms into his neck and across the shoulders. Upon physical examination, Dr. Koprivica found some ulnar neuropathy, loss of grip strength, diffuse proximal weakness in both upper extremities, cervicothoracic regional pain with shoulder girdle and cervical spine range of motion testing. The doctor attributed claimant's cervical and bilateral upper extremity conditions to his work activities.

Dr. Koprivica found claimant to be at maximum medical improvement and placed permanent restrictions of no climbing, no repetitive or sustained activities above shoulder girdle, no activities involving a sustained posture of the head and neck, no jarring in the head and neck region, no repetitive pinching, grasping, wrist flexion or extension, no repetitive ulnar deviation or repetitive elbow flexion or extension, no exposing his upper extremities to vibration, and, no lifting or carrying greater than 50 pounds.

Based on the *AMA Guides*⁴, Dr. Koprivica rated claimant's loss of strength to the right upper extremity at 30 percent, loss of strength to the left upper extremity at 30 percent, and an additional 30 percent to each upper extremity for loss of pinch strength. The doctor opined claimant's upper extremity rating should be a 30 percent bilaterally. Converting the bilateral 30 percent upper extremity results in an 18 percent whole person impairment for each upper extremity. Dr. Koprivica placed claimant in the DRE Category II for a 5 percent whole person impairment due to additional involvement of claimant's shoulder girdles. An additional 5 percent whole person impairment was assigned for claimant's loss of bilateral shoulder girdle motion as well as cervicothoracic regional motion deficits. Using the Combined Value Charts, these whole person impairments result in a 36 percent whole person impairment. Finally, Dr. Koprivica reviewed the task list prepared

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

by Michael Dreiling and opined claimant would be unable to perform 13 out of the 16 tasks for an 81 percent task loss.

On January 20, 2010, the ALJ ordered an independent medical examination by Dr. Terrance Pratt to determine claimant's functional impairment rating and restrictions. Dr. Pratt reviewed the medical records provided including Drs. Koprivica, Gonzalez and Carabetta's documentation. The doctor performed a physical examination on April 9, 2010, and diagnosed claimant with cervicothoracic syndrome and clinical changes suggestive of degenerative disease small joints of the hand. Claimant had a history of multiple peripheral nerve entrapment including bilateral median nerve wrist, ulnar nerve elbow level, and ulnar nerve wrist as well as status-post release procedures, ulnar nerve wrist and elbow level bilaterally, median nerve wrist bilaterally with repeat procedures, ulnar nerve and median nerve wrist on the left, and, pseudo bursa with excision left elbow bilaterally. Dr. Pratt also opined that claimant sustained an aggravation of his cervical spine from his work related activities.

At the time of Dr. Pratt's evaluation, claimant was at maximum medical improvement and the doctor placed permanent restrictions on the claimant of no overhead activities with the bilateral upper extremities; avoid use of vibratory tools or repetitive activities of the bilateral upper extremities which require forceful grasping or sustained grasping; no lifting greater than 30 pounds; and, no pushing or pulling greater than 60 pounds.

Based on the AMA Guides, Dr. Pratt rated claimant's cervical and parascapular involvement as well as generalized limitations for a 5 percent whole person impairment which placed claimant in the DRE Category II. The doctor provided a 10 percent impairment to claimant's right upper extremity due to carpal tunnel syndrome plus 10 percent for ulnar nerve elbow and another 5 percent for the ulnar nerve at the wrist. The right upper extremity impairments combine for a 22 percent or a 13 percent whole person impairment. Claimant's left upper extremity was rated at 10 percent for median nerve entrapment at the wrist and ulnar nerve at the elbow. An additional 10 percent was for the ulnar nerve, ulnar at the wrist again less than mild or 5 percent impairment to the left extremity. These left upper extremities combine for a 22 percent or a 13 percent whole person impairment. Using the Combined Value Charts, the whole person impairments (13+13+5) result in a 28 percent whole person functional impairment.

Michael Dreiling, a vocational rehabilitation counselor, conducted a personal interview with claimant on July 20, 2010, at the request of claimant's attorney. He prepared a task list of 16 nonduplicative tasks claimant performed in the 15-year period before his injury. Mr. Dreiling reviewed Drs. Pratt and Koprivica's medical records and restrictions. At the time of the interview, claimant was not working and had not worked since he was terminated from respondent's employ. Due to claimant's age, education, vocational profile, training, significant medical restrictions and lack of clerical or office skills, Mr. Dreiling opined that claimant is essentially and realistically unemployable in the open labor market.

Claimant's last day worked was August 12, 2009. Respondent terminated claimant on August 18, 2009.

Respondent argues that claimant failed to establish a work-related injury to his neck and points to the lack of cervical complaints in the contemporaneous medical records while claimant received treatment for his bilateral upper extremities.

Initially, it must be noted that the primary focus of treatment was for claimant's bilateral upper extremities. The first surgeries on claimant's upper extremities were not beneficial and that led to multiple additional surgeries.

Although Dr. Gonzalez did not recall neck complaints, the initial medical records from the Olathe Occupational Medicine Clinic indicate claimant had additional complaints other than just his bilateral upper extremities. Claimant testified he repeatedly complained of pain in his shoulder, back and neck on his visits with Dr. Gonzalez and his physical therapist. Dr. Koprivica opined that a specialist, such as Dr. Gonzalez, understandably will focus on just the specific body part that they are treating. Dr. Pratt also stated that he had previously heard complaints that Dr. Gonzalez did not always record all complaints. Dr. Pratt testified:

Q. Are you familiar with Dr. Gonzalez?

A. Only reports.

Q. Okay. Never heard previously that he has not reported complaints that patients have provided to him?

A. I've heard that previously, but it's in the same circumstances now.

Q. Where a claimant is making statements, in other words, that he hasn't put those down?

A. Correct.⁵

During the course of treatment for his bilateral upper extremities, EMG testing was performed on claimant several times. Claimant testified the last test included the shoulder upper back and neck area. And Dr. Pratt noted two of the EMG tests included screening for proximal pathology which indicated concern for a neck injury. Dr. Pratt specifically noted that the medical records detailed claimant's complaints of pain across his shoulders and back. And Dr. Pratt noted that frequently shoulder and back complaints are made when someone has cervical involvement.

⁵ Pratt Depo. at 67-68.

With regard to the scarcity of medical records Dr. Pratt testified:

Q. Well, how would they assess it if he didn't make any complaints to them?

A. He did complain of symptoms going up and across the shoulders, which would lead me to assess the cervical region, or that would be a positive indication of cervical symptoms; but in spite of those complaints, which were not frequent but were noted, there was no evaluation of the cervical region at that time.⁶

Drs. Koprivica and Pratt determined claimant suffered permanent functional impairment to his cervical spine. The Board finds their opinions persuasive and affirms the ALJ's determination claimant suffered a whole body impairment.

In *Bryant*⁷, the Kansas Supreme Court stated the general rule:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Thus, as in this case where there are injuries to both a scheduled member (bilateral upper extremities) and to a nonscheduled portion of the body (cervicothoracic spine), the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.⁸ The ALJ adopted the court ordered medical examiner's functional impairment ratings as the most persuasive. The Board agrees and adopts Dr. Pratt's rating opinion that as a result of his work-related injuries claimant suffered a 28 percent whole person functional impairment.

Claimant alleged he is entitled to a work disability. In the determination of permanent partial disability based upon a work disability, K.S.A. 44-510e, requires claimant's wage loss to be averaged with his task loss.

At the time of the regular hearing claimant was unemployed and had been unsuccessful in his search for a job. Pursuant to *Bergstrom*,⁹ claimant has suffered a 100 percent wage loss. Dr. Koprivica provided the only task loss opinion and he opined claimant suffered an 81 percent task loss. Averaging the wage loss and task loss results

⁶ Pratt Depo. at 46-47.

⁷ *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

⁸ See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

⁹ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

in a 90.5 percent work disability. Accordingly, the Board affirms the ALJ's finding claimant suffered a 90.5 percent work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Marcia L. Yates Roberts dated June 28, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Mark Beam-Ward, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge

¹⁰ K.S.A. 2010 Supp. 44-555c(k).